Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Connect America Fund	)	WC Docket No. 10-90

COMMENTS OF VERIZON AND VERIZON WIRELESS[1]

The rate survey format the Wireline Competition Bureau ("Bureau") proposes to use to compare urban and rural rates is generally workable. Some changes and clarifications, however, are necessary. Most important, the Bureau should make clear that the reasonably comparable broadband rate certification addressed in the *Notice*[2] does not apply to price cap carriers that receive only legacy high-cost support. Whatever the scope of the broadband rate *survey* requirement, and whatever useful information can be gleaned from that survey, application of the broadband rate *certification* mandate to ETCs that receive only legacy high-cost support would serve no valid policy purpose and would be unlawful. With respect to the proposed rate survey itself, the Bureau should make various amendments to ensure that – where applicable – the survey actually captures accurate and useful data regarding the state of the broadband marketplace as it now exists.

DISCUSSION

1. The Bureau should clarify that the broadband rate certification requirement does not apply to price cap carriers that receive only legacy high-cost support. The *USF/ICC*

[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc. and Verizon Wireless (collectively, "Verizon").

[2] Public Notice, *Wireline Competition Bureau Seeks Comment on Proposed Urban Rates Survey and Issues Relating to Reasonable Comparability Benchmarks and the Local Rate Floor*, DA 12-1199 (rel. Jul. 26, 2012) ("*Notice*").

Transformation Order[3] did not intend for the certification to apply to such carriers, and to so apply it would exceed the Commission's authority and violate the Administrative Procedure Act ("APA").

As the *Notice* indicates, the *USF/ICC Transformation Order* directed the Bureau, along with the Wireless Telecommunications Bureau ("WTB"), to survey residential urban rates for fixed voice, fixed broadband, mobile voice, and mobile broadband services.[4] The survey data will be "used to develop reasonable comparability benchmarks for voice and broadband rates that carriers will annually *certify* their rates do not exceed…."[5] But the *Notice* cannot be read to suggest that price cap ETCs that receive only legacy high-cost support (*i.e.*, "frozen" support pursuant to 47 C.F.R. § 54.313(c)) are subject to reasonably comparable broadband pricing restrictions via these certification requirements. There is no basis to impose broadband pricing restrictions on carriers (even other ETCs) that receive only legacy high-cost support, which instead was calibrated for the provision of voice service.

Expanding application of the rate certification requirement to ETCs that receive only legacy high-cost support would not serve any valid policy goal articulated by the *USF/ICC Transformation Order*. The *USF/ICC Transformation Order* makes clear what the certification requirement is intended to accomplish. The section of the *Order* discussing reporting and certification requirements is entitled "Accountability and Oversight," and explains that ETCs "must be held accountable for how they spend" the "billions of dollars that the Universal Service

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[3] *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*USF/ICC Transformation Order*" or "*Order*"); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011) (subsequent history omitted).

[4] *See id.* ¶ 2.

[5] *Id.* ¶ 3 (emphasis added); *see also USF/ICC Transformation Order* ¶ 573.

Fund disburses each year."[6] The *Order* then expressly states that the rate certification requirements adopted are intended to "provide federal and state regulators the factual basis to determine that all USF recipients are using support for the intended purposes, and are receiving support that is sufficient, but not excessive."[7] Taken together, these statements make clear that the broadband rate certification was intended to ensure that recipients of broadband support are using that funding for its intended purpose.

Imposing the certification requirement on recipients of CAF Phase II support therefore makes sense. But imposing that same requirement on other carriers (even other ETCs) does not. In particular, the Commission should not require recipients of frozen legacy high cost support to certify that their broadband rates are reasonably comparable. Frozen legacy funding is based on the provision of legacy voice services. Only if the Bureau fails to implement CAF Phase II broadband support by January 1, 2013 would price cap ETCs be required to use more of this frozen funding to "build and operate broadband-capable networks," but – even then – there is no requirement that ETCs extend broadband service beyond their current broadband footprint. 47 C.F.R. § 54.313(c). Moreover, there is no connection between the "build and operate" requirement and a reasonably comparable broadband service *pricing* requirement.

Use of legacy voice funding to "build and operate broadband-capable networks" is an interim step that is not related to the actual *provision* of broadband *service* to all requesting customers in a supported area. The methodology used to set the level of frozen support – simply maintaining the level of support established by legacy voice programs – was not designed to provide a sufficient level of support to ensure reasonably comparable broadband rates. Indeed, there simply is no connection between legacy funding levels for voice services and funding that

[6] *USF/ICC Transformation Order* at ¶ 568.

[7] *Id.* ¶ 573.

is sufficient for an ETC to accept universal broadband service obligations throughout its legacy voice service area.

By contrast, figuring out the right level of funding ("sufficient but not excessive"[8]) for these new broadband service obligations is the very purpose of the CAF Phase II broadband cost model proceeding. The broadband cost model for CAF Phase II will provide the Bureau with what it needs to satisfy its statutory obligation to provide funding that is sufficient to meet the new broadband program objectives. 47 U.S.C. § 254(b)(3). Accordingly, broadband pricing restrictions on ETCs that receive frozen high cost support cannot be viewed as being "associated with the use of such funding," because frozen support was never designed to be (and, indeed, is not) sufficient to actually provision broadband services throughout a legacy voice service territory.

Moreover, recipients of frozen support have no obligation to offer broadband service at the 4 Mbps downstream and 1 Mbps upstream speeds for which the *Notice* itself proposes to gather pricing data and which the Commission has used as the relevant speed benchmark for its forward-looking broadband policies. 47 C.F.R. § 54.313(c). That disconnect further dissociates frozen support from the broadband pricing certification in the *USF/ICC Transformation Order*. And, logically, pricing requirements for broadband must follow broadband *service* requirements.

Finally, because frozen high-cost support was designed and distributed to ETCs for a different purpose, imposing broadband pricing restrictions on potentially all of these carriers' unsupported broadband services as a result of receiving that support would be patently unfair. Such back-door pricing regulation of broadband in a situation where a carrier does not actually receive sufficient support to provision broadband is not authorized by the *USF/ICC Transformation Order* – especially with respect to frozen support, the timing and continuation of

[8] *Id.* ¶ 568.

which is solely within the Bureau's discretion. Whatever public interest conditions the Commission might place on an ETC's receipt of legacy USF support for voice services simply cannot be served by requiring the company to adopt specified rates for *unsupported* broadband services. In short, the *Order* did not authorize application of the broadband rate certification to entities receiving only frozen legacy support.[9]

To read the order more broadly also would be unlawful. The Commission, of course, lacks independent authority to impose rate regulation on broadband Internet access, which it has long held to constitute an "information service."[10] Moreover, the fact that a carrier receives legacy universal service support for voice services does not authorize the Commission to regulate its broadband services. The Administrative Procedure Act and associated precedent require a "rational connection" between an agency's regulatory mandates and the statutory goals it seeks to further through those mandates.[11] But there is simply *no* connection between (1)

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[9] The *USF/ICC Transformation Order* contains certain language that may be read to create some ambiguity on this issue, suggesting that the broadband rate certification mandate applies to ETCs receiving "any … support" other than Mobility Phase I support. *Id.* ¶ 593. However, read in context, it should be clear that this mandate was meant to be applied only to ETCs receiving other support to actually provision broadband service (for which frozen support is not intended). *Id.* Indeed, that is the only way to harmonize paragraph 593 of the *Order* with the Commission's statements that the certifications contemplated by the *Order* were meant to address the sufficiency of support amounts to provision broadband; frozen high cost support was never intended to be sufficient to provide broadband service throughout an ETC's legacy voice service area. *See*, *e.g.*, *id*. ¶ 573. For that matter, the same is true for CAF Phase I "incremental" support. This funding was never intended to be sufficient to deploy broadband throughout a legacy voice service territory. Indeed, it is only designed to extend broadband networks a relatively small number of unserved households in price cap territories.

[10] *See, e.g.*, *id.* ¶ 113 n.185 ("Consistent with the fact that the Commission does not set regulated rates for broadband Internet access service, the comparison of rural and urban rates will be conducted pursuant to the principles set forth in section 254(b)(3) of the Act and is solely for the purposes of compliance with section 254's mandates.").

[11] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). *See also Bowen v. American Hospital Association*, 476 U.S. 610, 627 (1986) (stating that the "mere fact that there is 'some rational basis within the knowledge and experience of the [regulators]'

application of a broadband certification requirement to carriers that do not receive CAF Phase II broadband support and (2) the goals associated with the certification – namely, the assurance that CAF funds are sufficient to bring affordable broadband service to unserved Americans. As discussed above, frozen high cost support was never intended to be (and, indeed, is not) sufficient to provide broadband service throughout an ETC's legacy voice service territory, which is the point of the Bureau's separate cost model proceeding. The absence of such a nexus forecloses any broadband rate certification requirement for frozen high cost support recipients.

The Commission can properly condition the receipt of USF funding on certain requirements, but imposing price restrictions on broadband services offered by carriers receiving only legacy high-cost funding would turn Title II and APA law on its head. The Commission cannot do something for which it lacks authority – *i.e.*, regulating the price of broadband – simply by imposing a public interest condition on funding that was never calibrated to, and is insufficient for, the provision of broadband service. The same would be true if, for example, the Commission attempted to place pricing restrictions on a carrier's broadband services as a condition of Lifeline program reimbursements for providing voice service to low-income consumers – *after* the carrier had already provided discounted service to customers.

Similarly, under the APA, the certification requirement cannot be extended to additional entities without first conducting a further rulemaking.[12] That approach would require action by

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under which they 'might have concluded' that the regulation was necessary to discharge their statutorily authorized mission will not suffice to validate agency decision-making") (internal citations omitted) (alterations in original).

[12] *See generally* 5 U.S.C. § 553(c) ("[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."); *id.* § 551(5) ("'rule making' means agency process for formulating, amending, or repealing a rule").

the Commission, as the Bureau lacks any independent authority to adopt rules absent a specific delegation from the Commission.[13]

The *USF/ICC Transformation Order* is best read to avoid these considerable legal problems. The Bureau should make clear that the reasonably comparable broadband rate certification requirement does not apply to providers that receive only frozen legacy high cost support.

2. The Bureau also should make several modifications to the Proposed Rate Survey set out in Appendix A to the Public Notice so that the Survey will yield relevant and accurate information. Specifically, the Bureau should: (1) make clear that providers responding to the survey are required to report only those broadband rates currently available in the market; (2) clarify whether carriers are required to report rates for non-discounted broadband services that are only offered with local voice service; and (3) create additional upstream/downstream speed tiers. The Bureau should also allow responding ETCs to certify the reasonable comparability of their rates without reference to the survey benchmarks where they offer uniform rates state-wide (or nationwide), or the carrier's rates in rural areas are actually lower than the carrier's rates in urban areas.

First, the Bureau should modify the Proposed Rate Survey to ensure that responding providers report on rates currently available in the market, not rates that are being paid by subscribers on rate plans that no longer are available to new customers. The *Notice* proposes that responding carriers report "rates that are available to potential customers rather than actual rates

[13] *See, e.g.*, 47 U.S.C. § 154(i) (authorizing "the Commission" to "make … rules and regulations"); 47 C.F.R. § 0.201(d) (permitting "Commission, by vote of a majority," to "delegate its functions"). While the *Order* delegated to the Bureau and to WTB authority "to conduct an annual survey of urban broadband rates," *USF/ICC Transformation Order* ¶ 114, it did *not* delegate authority to expand the scope of the separate certification requirement.

paid by existing customers."[14] Yet, in the text introducing both Sections II and III, the proposed survey instructs carriers to report the rates available both "to any existing or potential customer at the specified location."[15] This proposed language is inconsistent with what the *Notice* proposes, and the Bureau should clarify that carriers are required only to report the rate available to a *new* customer, as proposed in the *Notice*, rather than rates available to an "existing or potential customer," as the proposed survey now reads. This clarification will ensure that providers list only the prices now available, rather than including "grandfathered" rates that are being paid by existing subscribers for legacy plans that may not still be available in the market. This will present a more accurate picture of the current market and better serve the goals of the *USF/ICC Transformation Order*.

Second, the Bureau should clarify which broadband services are subject to the survey. The proposed instructions for Sections III.a and III.b ask responding carriers to report whether they offer standalone broadband Internet service at particular speeds.[16] The Bureau should clarify whether carriers are required to report rates for non-discounted broadband services that are offered only to customers purchasing voice service on the same account.

Third, the Bureau should modify the Proposed Rate Survey to better reflect the diversity of download/upload speed combinations being made available in the broadband marketplace. In Sections III.a and III.b, the proposed survey asks responding providers to report whether they offer broadband service in one or more "service ranges." The slowest service range, "Service Range 1," encompasses broadband services offering a download speed between 4 Mbps and 6 Mbps and an upload speed between 1 Mbps and 1.5 Mbps. The fastest service range, "Service

[14] *Notice* at ¶ 9.

[15] *Id.* ¶¶ 8, 10.

[16] *See id.* ¶ 10.

Range 4," encompasses broadband services with a download speed at or above 25 Mbps and an upload speed at or above 3 Mbps. These service ranges, however, would fail to capture various services that currently are offered by Verizon and, therefore, would seem likely to exclude offerings of other providers that would be responding to the survey.

By way of example, while Verizon offers FiOS Internet services with upload/download speed combinations that fall within "Service Range 4," it also offers FiOS Internet services with upload/download speed combinations that do not fit within any of the four proposed speed ranges. Again, as an example, Verizon offers a 15 Mbps download/5 Mbps upload service whose upload speed falls within Service Range 4 but whose download speed does not. Accordingly, the proposed survey would not capture services like these.[17] In order to collect pricing information for these kinds of service, the Bureau should modify the proposed survey.[18] In light of these issues, the Bureau should modify the proposed survey format to account for the greater diversity of services offered by providers in the competitive marketplace.

Finally, the Bureau should adopt a modified form of the presumption discussed in the paragraph 16 of the *Notice.*[19] As the Commission has found, "data shows that rates are

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[17] Verizon also offers xDSL-based broadband offerings that would not fall within any of the four proposed speed ranges, and assumes that other carriers do, as well. Verizon currently offers DSL services in four advertised speed ranges: (1) 0.5-1 Mbps download/384 kbps upload; (2) 1.1-3 Mbps download/768 kbps upload; (3) 3.1-7 Mbps download/768 kbps upload; and (4) 7.1-15 Mbps download/1 Mbps upload. While the upload and download speeds of the 7.1-15 Mbps/1 Mbps service both would match or exceed the minimum contemplated by the Commission's broadband-related public interest obligations, the particular combination of download and upload speeds would not fall within any of the proposed service ranges. While Verizon offers its own service categories merely as an illustration, it is likely that other carriers would have similar issues with the proposed service ranges.

[18] Verizon also advertises download speeds for its DSL-based services using ranges, while section III.b of the proposed survey assumes that carriers advertise a single download and single upload speed. Presumably, other carriers do the same.

[19] *Notice* at ¶16; s*ee also USF/ICC Transformation Order*, 26 FCC Rcd at 18047 ¶ 1027 ("Should we adopt a presumption that if a given provider is offering the same rates, terms and

reasonably comparable across rural and urban areas; where there are any differences, urban rates tend to be higher."[20] In that event, the statute does not require Commission intervention in rural areas. 47 U.S.C. § 254(b)(3) (directing the Commission to take steps to ensure that rural rates are reasonably comparable to rates for similar services in urban areas). Accordingly, the Commission should adopt a presumption that an ETC is meeting any requirement that rates be reasonably comparable if the ETC is either: (1) offering the same rates, terms and conditions to both urban and rural customers; *or* (2) is offering rates to rural customers that are below the rates offered to urban customers. Carriers whose rates satisfy either test should not be required to certify their rates against a national urban benchmark derived from the proposed rate survey.

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For the reasons discussed above, Verizon respectfully asks the Bureau to make clear that only CAF Phase II recipients are required to certify as to their broadband rates, and to modify the proposed rate survey to better reflect the existing broadband market.

Respectfully submitted,

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conditions (including capacity limits, if any) to both urban and rural customers, that is sufficient to meet the statutory requirement that services be reasonably comparable?").

[20] *High-Cost Universal Service Support, et al.*, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072, ¶ 71 n.229 (2010).